Supreme Court, U.S.
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NO. 99-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BEAR LODGE MULTIPLE USE ASSOCIATION, A WYOMING NON-PROFIT CORPORATION, ANDY PETEFISH D/B/A TOWER GUIDES, GARY ANDERSON, KENNETH D. ALLEN, GREGORY HAUBER, AND WES BUSH, INDIVIDUALS,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ROGER G. KENNEDY, DIRECTOR OF THE NATIONAL PARK SERVICE, KAREN WADE, REGIONAL DIRECTOR OF THE ROCKY MOUNTAIN REGION OF THE NATIONAL PARK SERVICE, CHAS CARTWRIGHT, SUPERINTENDENT OF DEVILS TOWER NATIONAL MONUMENT, AND THE NATIONAL PARK SERVICE,

Respondents,

AND

CHEYENNE RIVER SIOUX TRIBE, ROMANUS BEAR STOPS, BURDELL BLUE ARM, ARVOL LOOKING HORSE, AND STEVEN VANCE,

Respondent Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR INTERVENORS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners have standing to challenge the Final Climbing Management Plan for Devils Tower National Monument – a plan that discourages rock climbing in June out of respect for American Indian religious use of the monument – when their supposed injuries consist of nothing more than unsubstantiated economic losses, subjective fears about hypothetical future climbing restrictions, and philosophical objections to the Plan's accommodation of Indian religious practices.

2. Whether the Final Climbing Management Plan is a lawful accommodation of religion under the Establishment Clause of the First Amendment, since it does not advance or endorse Indian religion, but merely lifts a burden imposed on Indian religious practices by the government's ownership and management of a sacred site.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Indian Religious Practices at Devils Tower 1

B. The Final Climbing Management Plan 3

C. The Proceedings Below 6

REASONS FOR DENYING THE WRIT 9

I. PETITIONERS' ALLEGED INJURIES DO NOT SATISFY THE ARTICLE III REQUIREMENTS FOR STANDING 9

A. Petitioners Failed To Show Any Economic Injury 10

B. Petitioners' Professed Fear of a Future Climbing Prohibition Is Conjectural and Does Not Constitute Injury-In-Fact 12

C. Petitioners' "Fervent Objection" to the Voluntary Closure Is Not an Injury-In-Fact 15

D. The Tenth Circuit's Decision Does Not Create a Split Among the Circuits 17

II. THE CLIMBING PLAN IS PRECISELY THE KIND OF CONSTITUTIONAL ACCOMMODATION OF RELIGION APPROVED BY THIS COURT IN *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASS'N* (1988) 20

A. The Constitution Permits Accommodations of Religious Practices on Government Lands 21

B. The Climbing Plan Is Consistent with this Court's Establishment Clause Jurisprudence 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 13

A.C.L.U. v. Allegheny County, 842 F.2d 655 (3rd Cir. 1988) 17

A.C.L.U. v. Rabun County, 698 F.2d 1098 (11th Cir. 1983) 18-19

Allegheny County v. A.C.L.U., 492 U.S. 573 (1989) 17, 26, 27

Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) 18

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) 18

Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) 20

Bell v. Little Axe Indep. School. Dist., 766 F.2d 1391 (10th Cir. 1985) 19

Bennett v. Spear, 520 U.S. 154 (1997) 14

Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) 27, 28

Brashich v. Port Authority, 791 F.2d 224 (2d Cir. 1980) 25

Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) 26, 28

Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) 25-26

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 23, 26-27, 28-29

Cruz v. Beto, 405 U.S. 319 (1972) 26

Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982) 17

Edmond v. Robinson, 517 U.S. 1201 (1996) 16-17, 20

Employment Div. v. Smith, 494 U.S. 872 (1990) 21, 22

Flast v. Cohen, 392 U.S. 83 (1968) 20

Foremaster v. St. George, 882 F.2d 1485 (10th Cir. 1989) 18

Friends of Earth v. Laidlaw Envtl. Servs., 120 S.Ct. 693 (2000) 13

Hawley v. Cleveland, 773 F.2d 736 (6th Cir. 1985) 19, 25

Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) 21, 27

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) 26

Larkin v. Grendel's Den, 459 U.S. 116 (1982) 26, 27

Lee v. Weisman, 505 U.S. 577 (1992) 15, 29

Lemon v. Kurtzman, 403 U.S. 602 (1971) 26

Los Angeles v. Lyons, 461 U.S. 95 (1983) 13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 10

Lynch v. Donnelly, 465 U.S. 668 (1984) 17, 25, 26, 28

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 20-23

Northwest Indian Cemetery Protective Ass'n v. Lyng, 795 F.2d 688 (9th Cir. 1986) 22

Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586 (N.D. Cal. 1983) 22

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) 25

Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) 27

Rupert v. Director, U.S. Fish & Wildlife Service, 957 F.2d 32 (1st Cir. 1992) 27

Saladin v. Midgeville, 812 F.2d 687 (11th Cir. 1987) 18

School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) 26

Shumway v. Albany County School Dist., 826 F.Supp. 1320 (D. Wyo. 1993) 25

Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997) 17, 18

Texas Monthly v. Bullock, 489 U.S. 1 (1989) 21

Tyler v. Judges of Court of Registration,
179 U.S. 405 (1900) 13

Valley Forge Christian College v.
Americans United for Separation of
Church and State, 454 U.S. 464 (1982) 9-10, 11, 16, 17

Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988) 25

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 21, 23, 29

Legislation:

Act of Feb. 28, 1887, 19 Stat. 254 (1887) 2

American Indian Religious Freedom Act,
42 U.S.C. § 1996 (1999) 22-23, 27

Regulations:

32 C.F.R. § 553.22 (1999) 24

36 C.F.R. § 1.5 (1999) 24

36 C.F.R. § 2.51 (1999) 24

Miscellaneous:

Department of the Interior and Related Agencies
Appropriations Bill, 1989, H.R. 713, 100th Cong.,
2d Sess. (1988) 23

Exec. Order 13007, 61 Fed.Reg. 26771 (1996) 27

Fort Laramie Treaty of April 29, 1868,
15 Stat. 635 (1868) 2

Presidential Proclamation No. 658, 34 Stat. 3236 (1906).... 2

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of the National Park Service's Final Climbing Management Plan for Devils Tower National Monument in Wyoming. This plan discourages, but does not prohibit, rock climbing at the Tower during June in order to accommodate American Indians who consider the Tower sacred and whose religious practices are disturbed by rock climbing. Petitioners filed suit alleging the plan violates the Establishment Clause of the First Amendment. The question presented is whether petitioners have standing to challenge the climbing plan, when their "injuries" consist of nothing more than: (a) supposed economic losses that they cannot prove; (b) subjective fears about what restrictions the Park Service might impose in the future; and (c) fervent philosophical objections to the government's accommodations.

A. Indian Religious Practices at Devils Tower.

Devils Tower National Monument is a sacred site for the Cheyenne River Sioux and Indians from numerous other tribes. Petitioners' Appendix ("App.") 5.[1] For centuries, Indians have performed religious and cultural ceremonies there, including prayer offerings, vision quests, the leaving of prayer bundles, sweat lodge rituals, and the Sun Dance. *Id.* at 5-6. These ceremonies continue today. *Id.* For the Cheyenne River Sioux, traditional use of the Tower is:

> vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge

[1] The Cheyenne River Sioux refer to Devils Tower as "Mato Tipila," which means "Bear Lodge" in Lakota, or "He Hota Paha," which means "Grey Horn Butte" in Lakota. App. 5 n.2. For ease of reference, however, the Tribe shall refer to the monument hereinafter as "the Tower."

> from the spirits that helps us preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our own destiny.

Id. at 7 (quoting Bear Stops Aff. in D. Ct.).

The Tower is within the ancestral homeland of the Great Sioux Nation.[2] It was acquired by the United States in the late nineteenth century,[3] and was made the nation's first national monument in 1906.[4] The National Park Service now manages the monument, admitting nearly half a million visitors every year, and permitting many recreational uses, including rock climbing on the Tower. App. 12 & n.8.

Rock climbing interferes with the religious and cultural practices of Indians at the Tower. The court of appeals noted that "[i]n addition to placing permanent and temporary metal 'protection' in the rock, climbing requires climbers to yell certain commands to their partners. Climbers have also taken pictures of Native Americans in ceremonies, removed sacred prayer bundles, and intruded on solitude." App. 11. This interference has prevented many Indians from fulfilling the spiritual purposes of their ceremonies, and it has caused others to discontinue their use of the Tower altogether.[5] For the Cheyenne River Sioux, rock climbing on the Tower "affects us psychologically and spiritually. . . . When people climb on this sacred butte and hammer metal objects into it, the butte is defiled and our worship is intruded upon. It is like they pounded something into our bodies." CRST App. 6-7 (Looking Horse Aff. in D. Ct.).

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[2] Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1868).

[3] Act of Feb. 28, 1887, 19 Stat. 254 (1887).

[4] App. 12 (citing Proclamation No. 658, 34 Stat. 3236 (1906)).

[5] *See, e.g.*, CRST App. 3-4, 7, 163, 191. ("CRST App." refers to the Tribe's appendix in the court of appeals.)

B. The Final Climbing Management Plan.

The Park Service issued the Final Climbing Management Plan ("Climbing Plan" or "FCMP") in February 1995, after lengthy consultations with rock climbers, American Indians, and other interested parties. App. 13. The Climbing Plan regulates climbing activities in order "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature." *Id.* (quoting FCMP i).

The Park Service found that climbing has dramatically increased in recent years and that it has adversely:

> affected nesting raptors, soils, vegetation, the integrity of the rock, the area's natural quiet, and the rock's physical appearance. Some American Indians have complained that the presence of climbers on the sacred butte . . . has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.

App. 11 (quoting FCMP iii).[6]

The Climbing Plan restricts climbing, through a variety of measures, to protect the Tower's wildlife, vegetation, soils, and historical significance. Large parts of the Tower are closed for months every year to protect falcon nests and fledglings, FCMP 28; parts of the summit and summit edge

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[6] Despite the recent increase in rock climbing at the Tower, climbers still constitute a small percentage of overall park visitors. Of the half million people who visit the park annually, only 1.3%, or a few thousand, are climbers. App. 10, 12 n.8. Before the management plan was adopted, the average number of climbers who visited the Tower in June was just over one thousand, or 0.25% of annual visitation. *Id.* at 10. The number of June climbers has since declined considerably. *See id.* at 70.

are closed to protect fragile soil, vegetation, and bird nests, *id.* at 27-28; installation of new climbing bolts is forbidden to preserve the physical integrity of the Tower, *id.* at 26; and climbing in certain areas is forbidden to protect the 100-year-old Stake Ladder Route, *id.* at 6.[7] *See also* App. 13-14. Petitioners do not challenge any of these restrictions.

The Climbing Plan also attempts to reduce climbing to accommodate the centuries-old religious use of the Tower by Indians.[8] The plan discourages, but does not prohibit, rock climbing in June, a culturally significant month when the Cheyenne River Sioux and other Indians come to the Tower to conduct ceremonies. App. 14. Climbers are "asked to voluntarily refrain from climbing on Devils Tower during . . . June." *Id.* (quoting FCMP i). The decision to climb or not remains entirely voluntary: "Climbers can regulate themselves by deciding if they want to refrain from June climbing out of respect for American Indian cultural values." *Id.* (quoting FCMP 22).

Petitioners' repeated characterization of this voluntary climbing policy as the "June Climbing Ban," Petition ("Pet.") 2, 4, 5, 6, 11, 16, 23, is therefore a total fabrication.[9]

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[7] The Climbing Plan is reprinted in its entirety at pages 87-200 of the petitioners' appendix in the court of appeals.

[8] The plan recognizes the Tower's historical and contemporary significance as "a sacred site" to many Indian tribes. App. 5. The Tower is eligible for listing on the National Register of Historic Places as a "traditional cultural property." *Id.*

[9] Originally, the Climbing Plan prohibited commercial climbing guide activities on the Tower during June. However, in April 1996, petitioners filed a motion for a preliminary injunction seeking to enjoin implementation of this prohibition. App. 28-29. The district court granted the motion on June 8, 1996. *Id.* at 41. In November 1996, the National Park Service revoked the commercial climbing prohibition. App. 45.

The Park Service has also posted a sign at the base of the Tower encouraging visitors to stay on the designated trail. App. 14. The sign reads: "The Tower is sacred to American Indians. Please stay on the trail." *Id.* at 14 n.9. Off-trail activities often interfere with Indian religious practices. *See id.* at 11.

The stated goal of the voluntary closure to climbing in June is a "significant reduction in the number of climbers on Devils Tower each June." FCMP 23. The Climbing Plan contains no mandatory or coercive provisions and, indeed, expressly disavows enforcement efforts: "The NPS will not enforce the closure, but will rely on (a) climbers regulating themselves and (b) a new educational program to motivate climbers and other park visitors to comply." FCMP 22. During June, the Park Service's interpretive program – which runs throughout the year and addresses climbing and other aspects of the Tower's history – "explains the religious and cultural significance that the Monument has among some American Indians." App. 15-16. Participation in the interpretive program is, of course, entirely voluntary.

The Climbing Plan states that if, at some time in the future, the Park Service determines that the educational program and voluntary closure are unsuccessful, it will consider several further steps, including, but not limited to:

> (a) revise the climbing management plan; (b) reconvene a climbing management plan work group; (c) institute additional measures to further encourage compliance; (d) change the duration and nature of the voluntary closure; (e) convert the June closure to mandatory; (f) write a new definition of success for the voluntary closure.

App. 15 (quoting FCMP 23).

Preliminary data indicate that the voluntary closure has been successful, resulting in an 85% reduction in recreational rock climbing in June. App. 70. Consequently, the Climbing Plan has remained in place unchanged since November 1996.

C. The Proceedings Below.

Petitioners filed their second amended complaint in this action in the U.S. District Court for the District of Wyoming in December 1996. They sought to enjoin the Park Service from maintaining the voluntary closure to climbing in June, the sign asking visitors to stay on the designated trails, and the interpretation program. App. 45-46.[10] They argued that these features of the Climbing Plan promote Indian religions in violation of the Establishment Clause and that they also violate the Park Service's own management policies.

The Cheyenne River Sioux Tribe and four of its spiritual leaders intervened in the lawsuit to defend the National Park Service's accommodations. The individual intervenors and other members of the Tribe worship at the Tower in June. They are among the class of individuals whose religious use of the Tower is accommodated by the Climbing Plan.

On April 2, 1998, the district court issued a decision upholding all three of the challenged provisions of the Climbing Plan. App. 62.[11]

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[10] Petitioners also sought to enjoin the mandatory prohibition of commercial climbing contained in the original Climbing Plan, even though the court had already issued a preliminary injunction against that prohibition and the Park Service had rescinded it in November of 1996. App. 45-46.

[11] Inexplicably, petitioners characterize the district court's decision as a denial of a "motion for summary judgement [sic]." Pet. 2. There was no motion for summary judgment in this case. App. 16 n.10.

The court dismissed petitioners' challenge to the interpretive program for lack of standing. The only injury alleged by petitioners with respect to the program was that it "indoctrinated" school children in Indian religions under the guise of educating them about the heritage of the Tower. App. 51, 53. The district court held that petitioners lacked standing because none of the petitioners' allegations or affidavits or other evidence established that any of the individual petitioners are parents of "indoctrinated" children or that any such parents are members of petitioner Bear Lodge Multiple Use Association ("Bear Lodge"). *Id.* at 53.

The court also dismissed petitioners' challenge to the Park Service's trail sign for lack of standing. Petitioners alleged that the sign "coerce[s]" individuals into "participating in Native American religions by not allowing them to approach the Tower." App. 53. But petitioners never alleged that they were in fact coerced; the only injury they alleged was that some Bear Lodge association members were parents of children who had been "coerced." *Id.* at 53-54. But petitioners' own affidavits did not support this allegation, and the court held that, "to assume that the injury complained of somehow relates to the parties in this case would be to blindly step beyond the record." *Id.* at 54. [12]

Reaching the merits on petitioners' remaining claim, the court ruled that the voluntary closure to climbing in June does not violate the Establishment Clause or the National Park Service's management policies. App. 62. The court ruled that this measure is a legitimate accommodation of Indian religious practices, "carefully crafted to balance the competing needs of individuals using Devils Tower National Monument while, at the same time, obeying the edicts of the

[12] The court also dismissed as moot petitioners' challenge to the long-since rescinded ban on commercial climbing. App. 50.

Constitution." *Id.* The court held that the voluntary closure has neither the purpose nor the effect of endorsing Indian religions and it does not entangle the government in religious affairs. *Id.* at 56-61.

Petitioners appealed the ruling that the voluntary closure does not violate the Establishment Clause. They "abandoned their argument, totally rejected by the district court, that the interpretive program and sign injured school children visiting the Monument." App. 17 n.11. They also abandoned their argument that the voluntary closure violates Park Service policies and their challenge to the rescinded commercial climbing ban.

The Tenth Circuit held that petitioners lacked standing to challenge the voluntary closure because they failed to establish that they were injured in any way by the closure. App. 18-19.

- Since the closure was voluntary, the individual petitioners remained free to climb the Tower in June — and, in fact, all of them have continued to climb in June. App. 18.

- The Tenth Circuit noted that the district court found that petitioner Andy Petefish, a commercial climbing guide, "did not substantiate his claim of economic injury as a result of the voluntary closure, and he has provided no additional substantiation here." App. 18-19. Therefore, there was no economic injury to provide standing.

- Finally, petitioners alleged that other members of petitioner Bear Lodge had been "coerced" into complying with the June closure out of fear that, if climbing continued in June, the Park Service might one day institute a mandatory closure. App. 17, 19. The Tenth Circuit held that any such future development was

entirely "remote and speculative" and "hypothetical" and therefore did not confer standing. *Id.* at 19.

The court of appeals found the petitioners' lack of standing dispositive and did not reach their Establishment Clause arguments. App. 20.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ALLEGED INJURIES DO NOT SATISFY THE ARTICLE III REQUIREMENTS FOR STANDING.

One of the "landmarks setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III . . . is the doctrine of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At an "irreducible constitutional minimum," the standing doctrine requires a party to establish that he or she has "suffered an 'injury in fact'— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.*

In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 467-69 (1982), the plaintiffs challenged a government conveyance of property to a church-related college as a violation of the Establishment Clause. They argued that they had standing because they had suffered "an 'injury in fact' to their shared individual right to a government that shall make no law respecting the establishment of religion." *Id.* at 482 (citations omitted). This Court disagreed:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a

> consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86. The petitioners' allegations of injury in this case boil down to nothing more than what the Court rejected in *Valley Forge*.

A. Petitioners Failed To Show Any Economic Injury.

Petitioners allege that the voluntary June closure caused Andy Petefish to suffer economic injury to his commercial climbing guide service. Pls.' 2nd Am. Compl. at ¶ 68. The district court conducted an evidentiary hearing and found that Petefish's claims of financial injury were "unsupported by any credible evidence" and "plainly without merit." App. 39 n.8. The Tenth Circuit reached the same conclusion: "the district court found commercial climbing guide Andy Petefish did not substantiate his claim of economic injury as a result of the voluntary closure, and he has provided no additional substantiation here." App. 18-19.

Petitioners continue to assert "lost business" and "economic injury," Pet. 7, 13 n.8, but mere assertions are not enough, especially at this late stage of the proceedings. The burden of establishing injury-in-fact is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. While general allegations of injury may suffice at the pleading stage, ultimately those allegations must be "supported adequately by the evidence." *Id.* The courts below were unanimous in finding that petitioners failed to support Petefish's allegations

with evidence, notwithstanding the many opportunities they had to do so in all the years this case has been in the courts.[13]

Attempting to distract the Court from this failure, petitioners try to conjure a conflict between the Tenth Circuit's decision and this Court's ruling that "standing may be predicated on non-economic injury." *Valley Forge*, 454 U.S. at 486. Petitioners argue that the Tenth Circuit held that "one alleging a violation of the Establishment Clause *must* demonstrate economic injury," Pet. 13 (emphasis added), and therefore denied Andy Petefish standing solely because "he failed to prove that he suffered any economic injuries." *Id.* The decision below held no such thing. The court of appeals applied traditional standing analysis and considered all of petitioners' assorted claims of injury-in-fact and found all of them wanting. App. 18-19. Petefish, like the other petitioners, simply failed to establish "an injury of any kind, economic or otherwise, sufficient to confer standing." *Valley Forge*, 454 U.S. at 486.

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[13] Petitioners repeat that Petefish submitted a "sworn affidavit," Pet. 7, 13 n.8, but never explain why that mundane phenomenon is supposed to have the magical power to fulfill their burden to establish standing. The courts below found that the affidavit and all the rest of petitioners' submissions proved nothing and petitioners do not even offer an argument as to why the courts might be mistaken. Instead, they contend that Petefish's business *must* have suffered (even if they cannot prove it), since June climbing is down by 85%. Pet. 13-14 n.8. But this hardly shows that Petefish's business is down. Petitioners concede that Petefish is the only commercial climbing guide still working at the Tower in June. Pet. 24. (All the other commercial climbing guides have chosen to observe the voluntary June closure. *Id.*) Petitioners also concede that Petefish and his clients account for "approximately one third of the climbing activity during June." *Id.* (quoting App. 70-71). Plainly, Petefish is still guiding climbs in June and raking in *all* of the business available, which suggests that his business has not suffered at all. In any event, the burden is petitioners', not ours, and they have failed to shoulder it.

B. Petitioners' Professed Fear of a Future Climbing Prohibition Is Conjectural and Does Not Constitute Injury-In-Fact.

In their complaint and subsequent affidavits, petitioners allege that they can no longer climb the Tower in June without fear that the government will respond by enacting an outright climbing ban. Pls.' 2nd Am. Compl. at ¶¶ 2-6, 29; App. 85-88. *See also* Pet. 21. Notwithstanding these purported "fears," *all* of the individual petitioners have, by their own admission, continued to climb the Tower in June, App. 16-17, 18, so they have apparently gotten the better of their fears. But not all petitioners are made of such stern stuff. Two members of the Bear Lodge association assert that their fears have caused them to stop climbing in June. *See* Pet. 7, 21; App. 85-88. Consequently, petitioners argue, Bear Lodge has standing to challenge the Climbing Plan on behalf of these members. Pet. 3, 16, 21.

The source of these alleged "fears" is what petitioners describe as "threats of the federal government to make its June Climbing Ban mandatory if climbers continue[] to climb in June." Pet. 16.[14] The only thing in the record that petitioners can cite to for these phantom threats is the provision of the Climbing Plan in which the Park Service forecasts its options in the event the voluntary June closure is unsuccessful. *See* page 5, *supra*.

In the first place, petitioners' fears about these options are *speculation* about what the Park Service *might* do, *in the future*. Second, any such government action is dependent upon the failure of the voluntary closure, and, in fact, the

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[14] Note petitioners' tacit admission that the voluntary closure they persist in misrepresenting as a flat "ban" on June climbing is, in fact, not "mandatory."

voluntary closure has been successful. Third, making the June closure "mandatory" is but one of six options listed. Fourth, it is exceedingly unlikely, to say the least, that the government will enact a mandatory ban on climbing in June since the district court previously enjoined the enforcement of one such mandatory ban (on commercially guided climbing) and the Park Service acquiesced in that injunction and revoked the ban. App. 45.

The "reasonableness" of a plaintiff's alleged fear "is dependent upon the likelihood" of the occurrence he believes is threatened. *Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983). Under the circumstances of this case, petitioners cannot "credibly allege" that they face a "realistic threat from the policy." *Friends of Earth v. Laidlaw Envtl. Servs.*, 120 S. Ct. 693 (2000), 2000 U.S. LEXIS 501 at *33. The "subjective apprehensions" asserted by two members of petitioner Bear Lodge are not enough to support standing. *Lyons*, 461 U.S. at 108 n. 8.

If the Park Service should in the future decide to prohibit rock climbing at the Tower, petitioners (assuming they could meet all the standing requirements) would be able to challenge the prohibition at that time. But any challenge to the mere speculative possibility that the Park Service might try to impose a flat ban is not ripe for review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The federal courts are "not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law." *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900).

Therefore, the Tenth Circuit was correct to rule that petitioners' alleged "fear" of hypothetical adverse government regulation in the future does not constitute an "injury in fact":

> [T]he possibility of a mandatory closure is a "remote and speculative possibility," and is just one of many possibilities FCMP will consider if the present plan proves unsuccessful. The Climbers' fear of an outright climbing ban in June does not satisfy the constitutional requirement for an injury in fact, which must be "actual and imminent not conjectural or hypothetical."

App. 19 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

Apparently fearful that their subjective apprehensions of a future ban will once again be deemed unreasonable and incredible, petitioners now assert that the Park Service has taken covert measures to "stop any and all climbing in June." Pet. 18. These measures include: "press releases and other statements exerting pressure on visitors," a "website that warned against climbing," and "even one-on-one confrontations between armed and unarmed NPS employees and prospective climbers." Pet. 6-7, 18-19. Petitioners seem particularly eager to convey the image of "uniformed officers . . . armed with guns" stalking climbers and enforcing the voluntary June closure at gunpoint. Pet. 22.[15]

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[15] Petitioners even argue that the 85% decline in June climbing proves that the Park Service is coercing compliance with the Climbing Plan, since most climbers said they would not voluntarily stop climbing at the Tower out of respect for Indian religious views when asked prior to the Climbing Plan's adoption. Pet. 5, 19. Not only is petitioners' logic specious, so are the data on which they rely. The 1992 survey they cite found that 28 of the 42 climbers polled would not stop climbing altogether at the Tower if they knew Indians considered it sacred. App. 89. This says nothing, however, about climbers' willingness to refrain from climbing for just one month a year. The vast majority of climbers have demonstrated by their actions their willingness to accommodate Indians who worship at the Tower in June.

It would appear that petitioners have now passed beyond mere subjective apprehensions into the realm of full-blown paramilitary paranoia. More important, petitioners *never* raised these allegations in their complaint, affidavits, or testimony below, and they *never* introduced *any* evidence to substantiate them.[16] These 11th-hour, appellate allegations are wholly outside the record and therefore cannot form the basis for petitioners' standing.

The fact remains, *uncontested in the actual record*, that the government is not using threats or intimidation to coerce petitioners or anyone else to stop climbing in June. Nor is the government intimidating, coercing, or even *encouraging* petitioners or anyone else to participate in Indian ceremonies at the Tower or to adopt Indian beliefs about the Tower. Visitors to the Tower are asked to forbear temporarily from an activity that disrupts Indian ceremonies – much the same way that visitors to Arlington Cemetery are admonished to be quiet and respectful during religious burial ceremonies, *see* pages 23-24, *infra* – but no one is asked to endorse as their own the beliefs and practices involved in those ceremonies.[17]

C. Petitioners' "Fervent Objection" to the Voluntary Closure Is Not an Injury-In-Fact.

Petitioners now argue that they have standing because they are "'directly affected'" by the voluntary June closure, "due to the fact that they object to the closure of public lands on the basis of religion in violation of the Establishment

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[16] Perhaps this explains why Petitioners chose to omit their complaint from their appendix in this Court.

[17] Petitioners' argument to the contrary hopelessly misconceives this Court's coercion jurisprudence. Petitioners, after all, are not school children "forced by the State to pray in a manner [their] conscience[s] will not allow" at a "state-sponsored and state-directed religious exercise in a public school." *Lee v Weisman*, 505 U.S. 577, 593, 587 (1992).

Clause." Pet. 15. They allege that they are injured by "the direct effect on and ardent opposition by [them] to the federal government's refusal to maintain neutrality regarding visitor use of Devils Tower." *Id.* at 14. This injury is manifested in their "continuing and fervent objection to the failure of the federal government to maintain neutrality at Devils Tower." *Id.*

Although petitioners "claim that the Constitution has been violated, they claim nothing else." *Valley Forge*, 454 U.S. at 485. They repeatedly assert, without elaboration, that they have been "directly affected" by this violation, Pet. 9, 11, 14, 15, 16, as if chanting that mantra could substitute for actually "identify[ing] any personal injury suffered by them as a consequence of the alleged constitutional error." *Valley Forge*, 454 U.S. at 485. Petitioners' argument is admirably candid, if only because they repeat it so often: they claim standing because they "object" to the Climbing Plan and their objection is both "fervent" and "ardent." Pet. 7, 9, 14, 15, 16.

Petitioners' "objection" to the voluntary closure to June climbing is nothing more than "an abstract injury in nonobservance of the Constitution." *Valley Forge*, 454 U.S. 482-83. This Court made clear in *Valley Forge* that such abstract inquiries do not satisfy "the Art. III requirements of standing," *id.*, and that the "intensity" of one's interest and the "fervor of his advocacy" are not "permissible substitute[s] for the showing of injury." *Id.* at 486.

This case is indistinguishable from *Valley Forge*. The mere fact that petitioners "live near, visit, recreate, and work within Devils Tower," Pet. 9, does not somehow transform their philosophical objection to the voluntary closure into an injury in fact. *See Edmond v. Robinson*, 517 U.S. 1201, 1996 U.S. LEXIS 3019 at *3 (1996) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) (noting that '[m]ere

presence in the city, without further allegations as to injury, quite clearly fails to meet the standing requirements laid down in cases such as *Valley Forge*"). Nor do petitioners gain standing from the fact that they objected to the voluntary closure "consistently and repeatedly" during the administrative approval process. Pet. 15. *See Valley Forge*, 454 U.S. at 487 n.24 (noting that while the Administrative Procedure Act authorizes judicial review by persons aggrieved by agency action, "[n]either the [APA], nor any other congressional enactment, can lower the threshold requirements of standing under Art. III").

Article III requires more than a mere philosophical objection, however heart-felt, to perceived Establishment Clause violations. This Court has never departed from this requirement, *Valley Forge,* 454 U.S. at 488, 489 & n.26,[18] and no such departure is warranted here. Petitioners fail to establish any such injury and therefore lack standing to challenge the Climbing Plan.

D. The Tenth Circuit's Decision Does Not Create a Split Among the Circuits.

Petitioners try to salvage their case by claiming that the Tenth Circuit's decision creates a split among the circuits over the correct application of *Valley Forge*. They are wrong.

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[18] In *Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir. 1997), the Fourth Circuit incorrectly suggested that this Court had relaxed the injury-in-fact requirement in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny County v. A.C.L.U.*, 492 U.S. 573 (1989). The Fourth Circuit noted that this Court apparently found no infirmity in the standing of plaintiffs who alleged only direct contact with religious displays on municipal property. The court read too much into this Court's silence, for the plaintiffs in *Lynch* and *Allegheny County* had already established standing under the municipal taxpayer standing doctrine. *See Donnelly v. Lynch*, 691 F.2d 1029, 1030 (1st Cir. 1982); *A.C.L.U. v. Allegheny County*, 842 F.2d 655, 656 (3rd Cir. 1988).

First, some of the supposedly "conflicting" decisions cited by petitioners *predate Valley Forge* and therefore hardly evidence a conflict in the application of the standing principles established in that case.[19] Second, the court of appeals below did not, contrary to petitioners' misapprehension, hold that petitioners lacked standing "because they had not altered their behavior as evidenced by the fact that they continued to climb." Pet. 11-12. Rather, the court ruled that petitioners lacked standing because they failed to establish *any injury whatsoever* resulting from the Climbing Plan, be it economic, behavioral or otherwise.

This is entirely consistent with this Court's decision in *Valley Forge* and the post-*Valley Forge* circuit court decisions cited by petitioners. In each of those cases, the plaintiffs had alleged some actual injury resulting from the government conduct under scrutiny. In several cases, the plaintiffs alleged they were offended, filled with revulsion, intimidated, or made to feel like second-class citizens by government-sponsored religious displays.[20] In others, the plaintiffs alleged that government-sponsored religious displays or chapels impaired their use and enjoyment of public property.[21] In one case, the plaintiffs alleged that their

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[19] *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970).

[20] *Suhre*, 131 F.3d at 1085 (plaintiff alleged he was "offended," "filled with revulsion," and "distress[ed]" at sight of Ten Commandments display in county courtroom); *Foremaster v. St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (plaintiff alleged he was "greatly offend[ed]" and "intimidate[d]" on daily basis by "visual impact" of official city seal displaying image of religious temple); *Saladin v. Midgeville*, 812 F.2d 687, 689 (11th Cir. 1987) (plaintiffs alleged official city seal displaying words "Liberty" and "Christianity" "denigrated their personal and philosophical beliefs and made them feel like second class citizens").

[21] *ACLU v. Rabun County*, 698 F.2d 1098, 1103, 1108 (11th Cir. 1983) (plaintiffs challenged 26' x 35' illuminated cross erected by government in state park and "testified unequivocally at trial that they

children were subjected to unwelcome school-supervised religious meetings at a public school.[22]

The difference between this case and all those cited by petitioners is that, in those cases, the complaining parties did what Article III requires: they alleged, and then proved, in a timely manner, injuries sufficient to confer standing. To be sure, in this case petitioners' counsel have, in drafting their petition for certiorari, given themselves wide latitude to roam beyond the record and to imagine new supposed injuries. But petitioners themselves *actually alleged* nothing more than economic injury to Andy Petefish (which they utterly failed to demonstrate when pressed), and "fear" of a future climbing prohibition (which was unreasonable and utterly speculative).

Unlike the cases on which they rely, petitioners here never alleged that the voluntary closure to climbing offends their beliefs. They never alleged that it impairs their use and enjoyment of the Tower, aside from causing subjective, conjectural fears that are not reasonably traceable to the plan itself. They never alleged that they have been subjected by the government to unwelcome religious expression or religious exercises. Nor could they, for this case involves no religious expression by the government itself and no government-sponsored religious exercises. Rather, this case

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would not use [the park] so long as the cross remained there;" one plaintiff also testified he "suffer[s] from spiritual harm," because cross is located in "his special place of religious contemplation and retreat"); *Hawley v. Cleveland*, 773 F.2d 736, 739 (6th Cir. 1985) (plaintiffs alleged presence of sectarian chapel in public airport "impairs [their] use and enjoyment of the public facility").

[22] *Bell v. Little Axe Indep. School. Dist.*, 766 F.2d 1391, 1398 (10th Cir. 1985) (children subjected to religious meetings promoted by school, involving teacher participation and supervision).

involves government accommodations of privately held religious beliefs and private religious practices.[23]

Petitioners claim only that they "object" to the voluntary climbing plan because, to them, it represents "the failure of the federal government to maintain neutrality with regard to religious activity on federal land." Pet. 7. This is nothing more than a "generalized grievance[] about the conduct of the government." *Flast v. Cohen*, 392 U.S. 83, 106 (1968). Not a single circuit court has held that such a generalized grievance is sufficient to confer standing.

II. THE CLIMBING PLAN IS PRECISELY THE KIND OF CONSTITUTIONAL ACCOMMODATION OF RELIGION APPROVED BY THIS COURT IN *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASS'N* (1988).

The Tenth Circuit did not address the constitutionality of the Climbing Plan because it found the Art. III issues dispositive of the appeal. App. 20. Bizarrely, petitioners nevertheless argue that the decision below is somehow in "direct and intolerable conflict" with the "clear principles" set forth in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Pet. 30, namely "that federal land may not be closed to the public for the purposes of religious activity." Pet. 28.[24] But *Lyng* did not establish such

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[23] Quite simply, this case does not present the question of "whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs," *Edmond*, 517 U.S. 1201, 1996 U.S. LEXIS 3019 at *4 (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting), since petitioners have alleged no such injury and this case involves no state symbols.

[24] Petitioners also argue that the Tenth Circuit's decision in this case conflicts with the prior decision of the Tenth Circuit in *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied* 452 U.S. 954 (1981). Pet. 30. Even if that were true, such intra-circuit conflict is no

a principle; indeed, *Lyng* endorsed government efforts to accommodate the religious practices of Indian tribes on federal lands. The voluntary closure to climbing is entirely consistent with *Lyng* and the related decisions of this Court.

A. The Constitution Permits Accommodations of Religious Practices on Government Lands.

This Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987). Petitioners fatally misinterpret *Lyng* as forbidding accommodation of Indian religious practices on federal land. Pet. 28-29. *Lyng* was decided under the Free Exercise Clause of the First Amendment, not the Establishment Clause. *Lyng* held that the Free Exercise Clause did not require the National Forest Service to halt development of a road through areas of a national forest sacred to some American Indians. 485 U.S. at 453. However, a holding that the government is not *compelled* to take certain steps by the Free Exercise Clause does not mean that it is *forbidden* to take those same steps by the Establishment Clause. "The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). *Accord Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

In *Lyng*, the Court was careful to emphasize that "[t]he Government's rights to the use of its own land . . . need not

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basis for review by this Court. In any event, no conflict exists. The Tenth Circuit certainly did not perceive one, for it denied petitioner's petition for rehearing en banc. App. 66-67.

and should not discourage it from accommodating religious practices . . . engaged in by . . . Indian[s]" on federal lands. 485 U.S. at 454. The Court held that the job of reconciling competing demands for the use of public lands, "many of them rooted in sincere religious belief," belongs to the "legislatures and other institutions" of the political branches of the government. *Id.* at 452. *Accord Smith*, 494 U.S. at 890.

The *Lyng* Court commended the National Forest Service's "solicitude" toward Indian religious practices, noting that the National Forest Service had planned a number of "ameliorative measures," to reduce the burdens of the proposed road on Indian religious practices. 485 U.S. at 454. The route chosen for the road was "'the farthest removed from the contemporary spiritual sites.'" *Id.* "[T]en specific steps were planned to reduce the visual impact of the road" on the areas that were sacred to the Indians. *Id.* And the Forest Service proposed several measures to ensure that "[n]o sites where specific rituals take place [would be] disturbed." *Id.* These measures included: banning the recreational use of off-road vehicles in and around sacred areas; banning commercial timber harvesting in and around sacred areas; building the road on steep slopes without turn-outs or parking areas so that visitors could not stop and enter the sacred areas; and providing no signs or interpretive information to draw disruptive public attention to the spiritual or cultural values of the area. *Id.* at 454-55; *Northwest Indian Cemetery Protective Ass'n v. Lyng*, 795 F.2d 688, 702-03 & n.5 (9th Cir. 1986) (Beezer, J., dissenting in part); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F.Supp. 586, 592 (N.D. Cal. 1983).

The Court stressed that the government's "solicitude accords with 'the policy of the United States to protect and preserve for American Indians their inherent right of freedom

to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.' American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996." *Lyng*, 485 U.S. at 454-55.[25]

The Park Service has displayed similarly commendable, and equally constitutional, solicitude for Indian religious practices at Devils Tower National Monument. The Climbing Plan balances competing user interests and accommodates Indian religious ceremonies during June by removing the obstacles occasioned by rock climbing. The Plan does not, by any stretch of the imagination, constitute government sponsorship or endorsement of Indian religious ceremonies. Nor does it coerce non-adherents to participate in those ceremonies. This accommodation merely "permit[s] [Indian] religious exercise to exist" at the Tower "without sponsorship and without interference." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). "There is ample room under the Establishment Clause for [such] 'benevolent neutrality.'" *Id.* (quoting *Walz*, 397 U.S. at 699).

The Climbing Plan is in keeping with the federal government's many accommodations of religious ceremonies on federally owned land. At Arlington National Cemetery, the government accommodates the free exercise of religion at private memorial services by providing that such services

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[25] After *Lyng* was decided, Congress fulfilled its "institutional role," 485 U.S. at 456, by de-funding the road at issue in the case, thereby further accommodating traditional Indian religious practices on forest lands. *Department of the Interior and Related Agencies Appropriations Bill, 1989*, H.R. 713, 100th Cong., 2d Sess. (1988) ("prohibit[ing] the use of funds for the construction of the Gasquet-Orleans (G-O) road in California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction").

"may be closed to members of the general public." 32 C.F.R. § 553.22(c)(3). Some forms of conduct are prohibited at all times because they are inconsistent with the sacred, spiritual purposes to which the Cemetery is devoted: these include recreational activity, commercial activity, and disruptive and disorderly conduct. 32 C.F.R. § 553.22(f),(g). Visitors at the National Cemetery encounter signs requesting them to conduct themselves with dignity and respect on the cemetery's "hallowed grounds." CRST App. 17, 18. The official brochure reminds visitors that "*the cemetery is a shrine, not a place for recreation, picnics, or child's play. Thank you for respecting the feelings of those attending a burial.*" *Id.* at 22 (emphasis in original).

At many national parks, monuments, and historic sites, the Park Service owns, leases, or manages religious properties and "exercises its authority to exclude conflicting uses when necessary" to accommodate religious practices at those properties. Defs.' Br. in D. Ct. in Opp'n to Prelim. Inj. 11 n.6 (citing 36 C.F.R. § 2.51). *See also* 36 C.F.R. § 1.5. For example, at the Martin Luther King, Junior, National Historic Site in Georgia, the Park Service has a long-term leasehold interest in Ebenezer Baptist Church. CRST App. 111-17. The Park Service operates the church as part of the Historic Site, but accommodates the current congregation's need to use the church for private religious ceremonies. *Id.*[26]

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[26] Similarly, at the San Antonio Missions National Historic Park in Texas, a park that contains many active Catholic missions, the Park Service's official brochure states: "Please Be Considerate. The historic structures are fragile resources. Help us preserve them for future generations. Remember also that these are places of worship. Parish priests and parishioners deserve your respect; please do not disrupt their services." CRST App. 46. The record in this case is filled with such examples. *See, e.g., id.* at 9-148, 192, 199-205, 206-207.

Furthermore, the Park Service annually issues hundreds of permits allowing religious organizations to conduct religious services in national parks throughout the country. *See, e.g., O'Hair v. Andrus*, 613 F.2d 931, 934 (D.C. Cir. 1979) (Park Service "issues about 100 permits annually for religious activities on national park land within the District of Columbia" alone). Through this permitting process, the Park Service currently allows one organization, "A Christian Ministry in the National Parks," to conduct regularly-scheduled religious services in some 65 national parks, including Yellowstone and Yosemite. CRST App. 136, 118, 129-30. During these religious services, the Park Service may prohibit incompatible recreational uses of park facilities or lands. *See* Defs.' Br. in D. Ct. in Opp'n to Prelim. Inj. at 8 n.5.

When challenged, the government's accommodations of religious practices on public lands have routinely been upheld. For example, in *O'Hair v. Andrus*, the D.C. Circuit rejected an Establishment Clause challenge to the Park Service's grant of a permit authorizing Pope John Paul II to conduct a mass for 500,000 people on the National Mall. 613 F.2d at 932-33. The Park Service erected "fences and barriers" around the Mall and allocated $178,450 for extra police, construction costs, water and electrical services, and garbage removal. *Id.* The court ruled that "some use of public property for a religious purpose may occur without constituting an 'establishment' of religion." *Id.* at 204.[27]

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[27] The courts have also upheld designations of government property for religious prayer and worship services in: legislative buildings, *Van Zandt v. Thompson*, 839 F.2d 1215, 1216 (7th Cir. 1988); s*ee also Lynch*, 465 U.S. at 676, airports, *Hawley*, 24 F.3d at 815, 818; *Brashich v. Port Authority*, 791 F.2d 224, 226 (2d Cir. 1980), schools, *Shumway v. Albany County School Dist.*, 826 F.Supp. 1320 (D. Wyo. 1993), hospitals, *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 457 (8th Cir. 1988), *cert.*

The Climbing Plan is a constitutional accommodation of Indian religious practices at the Tower. It is consistent with *Lyng* and with the federal government's well-established policy of accommodating religious practices on public lands.

B. The Climbing Plan Is Consistent with this Court's Establishment Clause Jurisprudence.

Petitioners argue that this case raises important, far-reaching Establishment Clause problems. Pet. 17-18, 19-20, 22, 23-26, 28-30. They are wrong. The Climbing Plan easily satisfies the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and the endorsement test, *see, e.g., Allegheny*, 492 U.S. at 592-94.

The Plan satisfies the three-part *Lemon* test. First, it is motivated by secular, not religious, purposes:

- It strives to preserve all of the Tower's natural and cultural resources and to balance the competing demands of different user groups. This is a secular purpose. *Larkin v. Grendel's Den,* 459 U.S. 116, 121 (1982).

- It strives to accommodate Indian religious practices at the Tower by reducing burdens imposed on those practices by the government's ownership and management of the Tower. This Court has long held that "it is a permissible legislative purpose to alleviate significant governmental

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denied, 489 U.S. 1096 (1989), military facilities, *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *see also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 n.10 (1963), and prisons, *see, e.g., Cruz v. Beto*, 405 U.S. 319, 323-24 (1972) (Rehnquist, J., dissenting); *Schempp*, 374 U.S. at 297-98 (Brennan, J., concurring). The courts have also upheld designations of public property for religious displays. *See, e.g., Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 763, 770 (1995); *Allegheny*, 492 U.S. at 620; *Lynch*, 465 U.S. at 685.

interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. *Accord Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 705-6 (1994); *Allegheny County*, 492 U.S. at 613 n.59; *Grendel's Den*, 459 U.S. at 123-24.

- It strives to fulfill the government's special obligation "to protect Indian sacred sites and traditional forms of worship." App. 9. *See also id.* at 9-10 & n. 6 (citing numerous federal laws protecting Indian religions, including AIRFA, 42 U.S.C. § 1996, and Exec. Order 13007, 61 Fed.Reg. 26771 (1996)). This is a secular purpose. *See, e.g., Rupert v. Director, U.S. Fish & Wildlife Service*, 957 F.2d 32, 35 (1st Cir. 1992) (upholding special law allowing Indians to hunt and possess eagle feathers for religious purposes on grounds that law serves secular purpose of fulfilling government's duty to "protect[] Native American religion and culture"); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991) (upholding exemption from federal criminal narcotics laws allowing Indian churches to use peyote in religious ceremonies).

Second, the primary effect of the voluntary June closure is the removal of government-imposed burdens on Indian religious practices at the Tower. This is, as discussed above, a secular effect. *See Amos*, 483 U.S. at 335-37; *Hobbie*, 480 U.S. at 144-45; *Kiryas Joel*, 512 U.S. at 705-6.

The Climbing Plan does not advance Indian religions. The Park Service provides no financial assistance or sponsorship to Indian religious practitioners at the Tower, the government is not involved in their ceremonies, nor does the government require, or even encourage, anyone to join in the ceremonies or to adopt Indian religious beliefs. Petitioners may object to the Indian religious practices at the Tower, but

as long as they are not required to participate in any act or adopt any belief that violates their religious consciences, they have no constitutional objection on the grounds of coercion. The fact that the Climbing Plan may encourage tolerance and respect for Indian religious practices does not render it unconstitutional. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., joined by Blackmun and Ginsburg, JJ., concurring) (teaching people "to be tolerant and respectful" of minority religions "raise[s] no constitutional concerns;" rather it "further[s] the strong public interest in promoting diversity and understanding").

Third, the Climbing Plan does not entangle the government with Indian religion affairs. It contemplates no government management, monitoring, or evaluation of Indian religious ceremonies, and the Park Service certainly has not ceded its regulatory authority over the Tower to religious organizations. Indeed, the Climbing Plan serves only to remove burdens imposed by the Park Service itself in allowing rock climbing at the Tower in the first place.

The Climbing Plan also satisfies the endorsement test. A reasonable observer, aware of the history and context of Indian religious practices at the Tower and the interference therewith occasioned by rock climbing, *see* App. 5-12, would not view the Climbing Plan as "communicating a message of government endorsement . . . of [Indian] religion[s]." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). *See also Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 772-73, 779-81 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring). Rather, a reasonable observer would view the program as a limited measure facilitating the free exercise of religion by Indians. Government actions, like the Climbing Plan, that accommodate religion by lifting "an identifiable burden on [religious] exercise" do not communicate a

message of endorsement. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring). *Accord Lee v. Weisman,* 505 U.S. 577, 628-29 (1992) (Souter, J., joined by Stevens and O'Connor, JJ., concurring) ("in freeing the Native American Church from federal laws forbidding peyote use, . . . the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to lives of certain Americans").

When the government accommodates religious practices, as it has done in this case, "it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs." *Walz*, 397 U.S. at 672.

CONCLUSION

The petition for writ of certiorari should be denied.

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